Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF MARYLAND,
Petitioner,

v.

JERRY LEE WILSON,
Respondent.

On Petition For Writ of Certiorari
To The Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a police officer makes a lawful traffic stop, does the officer's automatic right to order the driver to exit the vehicle pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), extend to passengers in the stopped vehicle?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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On Petition For Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINIONS BELOW

The reported opinion of the Court of Special Appeals of Maryland, *State v. Wilson*, 106 Md. App. 24, 664 A.2d 1 (1995), affirming the granting of respondent's motion to suppress, is reproduced in Appendix A. (App. 1a-32a). A

prior unreported order affirming the judgment below is reproduced in Appendix D. (App. 38a).

The unreported opinion and order of the Circuit Court for Baltimore County granting Wilson's motion to suppress is reproduced in Appendix B. (App. 33a-36a).

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari, *State v. Wilson*, 340 Md. 502, 667 A.2d 342 (1995), is reproduced in Appendix C. (App. 37a).

STATEMENT OF JURISDICTION

The order of the Court of Appeals of Maryland denying the State's petition for a writ of certiorari was filed on November 22, 1995. This petition is filed within ninety days of that order, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At approximately 7:30 p.m. on June 8, 1994, Maryland State Police Trooper David Hughes observed a white 1994

Nissan Maxima driving in the left lane of Interstate 95 in Baltimore County at what appeared to be a high rate of speed. (App. 2a). Hughes pulled out onto the road and drove directly behind the vehicle, "pacing" it for one mile and determining its speed to be 64 miles per hour in a 55 miles-per-hour zone. (*Id.*). Trooper Hughes noticed that there was no license tag on the front or back of the car, except that on the back there "was a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." (*Id.*). The officer activated his lights and siren, but the driver of the vehicle continued to drive for approximately one-and-one-half miles before finally stopping. (*Id.*).

During the pursuit, Officer Hughes observed three people in the car, two in the front and one in the back. (*Id.*). Hughes saw constant movement by the front and rear seat passengers. In particular, the passengers turned and looked at the police officer several times and continuously ducked below the seat level and then reappeared. (*Id.*). Once the vehicle stopped, Hughes continued to see a lot of movement in the car, which made him hesitant to approach it.

Trooper Hughes got out of his vehicle and saw that the driver of the Nissan had already exited the car. (App. 2a-3a). The trooper directed the driver, Mr. McNichol, to step back toward him, and Hughes met the driver in between their vehicles. (App. 3a). Hughes advised McNichol that he had been stopped for speeding and asked to see his license and registration card. (*Id.*). McNichol produced a valid Connecticut driver's license and told the officer that he was on his way from Connecticut to South Carolina. (*Id.*). When McNichol indicated that the rental papers were in the car, Hughes instructed him to retrieve them. (*Id.*).

Throughout this encounter, Officer Hughes noticed that McNichol was unusually nervous. (App. 3a). He was trembling and was answering every question with another question. (*Id.*). Hughes also observed that the front seat passenger, respondent Jerry Lee Wilson, was sweating and extremely nervous. (*Id.*). The officer then asked Wilson to exit the vehicle and step back toward Hughes. (*Id.*). After initially refusing to comply with the officer's request, Wilson opened the door to the car and took one step out, whereupon crack cocaine dropped to the ground. (*Id.*). At that time, Trooper Hughes arrested Wilson. (*Id.*).

Wilson was indicted on charges of possession of cocaine with intent to distribute and related offenses. (App. 1a). At a suppression hearing held on November 23, 1994, the single issue before the court was whether the officer had violated Wilson's Fourth Amendment right to be free from unreasonable seizures when he ordered Wilson to step out of the vehicle. (App. 3a-4a). Wilson argued that the cocaine should be suppressed because Trooper Hughes was not justified in requiring him to get out of the vehicle. The prosecutor argued that the officer had the authority pursuant to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), to order Wilson out of the car and, alternatively, that the officer had reasonable articulable suspicion to do so. (App. 34a-35a).[1]

Trooper Hughes was the sole witness at the suppression hearing. (App. 2a). In addition to establishing the facts set forth above, Trooper Hughes testified as follows when asked why he had directed Wilson to exit the Nissan:

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[1] The State of Maryland is presently pressing only the first justification for the officer's order to exit the vehicle; thus, the alternative rationale for the order is not before this Court.

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

(App. 3a).

On January 10, 1995, the court granted Wilson's motion to suppress, ruling that *Pennsylvania v. Mimms* did not authorize a police officer making a traffic stop to order all passengers out of the car. (App. 34a-35a).[2] The State appealed this ruling to the Court of Special Appeals of Maryland. (App. 1a-2a). Speaking through Judge Charles E. Moylan, Jr., Maryland's intermediate appellate court framed the issue this way:

> The issue before us is very narrow. When a police officer makes a routine traffic stop, does his automatic right to order the driver to exit the vehicle, a procedure deemed to be constitutionally reasonable by *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), also extend to passengers in the stopped vehicle?

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[2] The court further ruled that the officer could not have had reasonable suspicion to believe persons in the vehicle were armed and dangerous because Hughes allowed the driver to return to the car to obtain the rental documents. (App. 35a). As stated above, this ruling is not being challenged here. *See* note 1, *supra*.

(App. 2a).

After discussing *Mimms* and pointing out that it did not deal with the right of officers to order passengers—as opposed to the driver—out of vehicles, (App. 7a-10a), the court carefully examined this Court's decisions that might be read as extending the *Mimms* principle to passengers, namely *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Michigan v. Long*, 463 U.S. 1032 (1983), (App. 10a-14a). The Court of Special Appeals of Maryland concluded that any references in those cases to *Mimms* were merely in passing and that any statement regarding the authority to order passengers from a vehicle was mere *dicta*, and mistaken at that. (*Id.*).

The court next examined the logic of *Mimms* to determine whether the rule governing drivers should apply to passengers. (App. 16a-21a). Although acknowledging it to be "a close question," the court held that the *Mimms* rule should not be extended to passengers. (App. 21a). The court reasoned that the passenger stood in a different position than the driver, who already was the subject of a lawful detention:

> Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention *per se*, and not a mere shift of the location of already established detention.

(App. 20a-21a). After noting the split of authority around the country, (App. 21a-25a), the court suggested that although passengers could not automatically be ordered from a stopped car, the justification for such an order

might be less than, and different from, the articulable suspicion necessary for a *Terry*[3] stop. (App. 26a-27a). In *dicta*, the court opined that perhaps a passenger could be ordered from a stopped vehicle based upon an officer's "reasonable justification for a sense of heightened caution or apprehension." (App. 32a).

REASONS FOR GRANTING THE WRIT

By requiring even a low level of justification to order passengers from a stopped vehicle, the court below and other courts adhering to this view endanger the hundreds, if not thousands, of police officers who stop vehicles each day for traffic violations.[4] Recognizing the danger inherent in these "routine" stops, this Court, almost two decades ago in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), fashioned a rule permitting police in the course of a lawful traffic stop to order the driver out of the vehicle without any particularized suspicion that the driver posed a threat to the officer's safety. This Court has yet to rule directly that police have the same authority, for the same reasons, to order passengers out of vehicles;

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[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

[4] More than twenty years ago, this Court cited a study showing "that approximately 30% of shootings of police officers occur when an officer stops a person in an automobile." *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973). The same study was also cited in *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972), and in *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam). Given the present-day proliferation of handguns and other firearms, the percentage of such shootings may well be much higher today.

however, the issue has arisen in numerous lower court decisions. Notwithstanding strong suggestions from this Court that the rule of *Mimms* applies to drivers and passengers alike, the courts are divided on the issue. With this case, the Court can explicitly state the rule that has been suggested by its earlier decisions, resolve the existing conflict among the lower courts, and provide a single bright-line standard to guide law enforcement officials who frequently confront this Fourth Amendment issue.

I.

THE LOWER COURT'S OPINION IS CONTRARY TO PRECEDENT OF THIS COURT.

The question whether a police officer, as a matter of routine practice and in the interest of officer safety, may order passengers to exit a lawfully stopped vehicle has not been squarely addressed by this Court. The Court has given strong indications, however, that the rule announced in *Mimms* for drivers does extend to passengers. The first, and perhaps strongest, indication of this is found in *Mimms* itself. In that case, this Court held that a police officer's order to a driver to step out of his car during a lawful traffic stop conformed to the dictates of the Fourth Amendment. 434 U.S. at 111. The Court balanced the *de minimis* intrusion into the driver's privacy and liberty interests against the State's "legitimate and weighty" interest in protecting officer safety. *Id.* at 110-11. The Court concluded that, on balance, an officer's ordering the driver to alight is *per se* reasonable without requiring the officer to show particularized justification for the order.

Id. at 111.

The Court's holding and the rationale for it prompted Justice Stevens to comment in his dissenting opinion: "Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger." *Id.* at 122 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting). Justice Stevens noted that the justification for the *Mimms* rule is grounded on "an assumption about the danger associated with every stop—no matter how trivial the offense" and that, accordingly, "the new rule must apply to the passenger as well as to the driver." *Id.* at 122-23. Notably, although the Court refuted a different remark in Justice Stevens's dissent, *id.* at 111 n.6, the Court did not dispute Justice Stevens's assessment that the *Mimms* rule applies to drivers and passengers alike.

Justice Powell, too, has read *Mimms* as applicable to passengers: "Last Term, this Court determined in *Pennsylvania v. Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made." *Rakas v. Illinois*, 439 U.S. 128, 155 n.4 (1978) (citation omitted) (Powell, J., joined by Rehnquist, C.J., concurring). Five years later, the Court noted in *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983), "that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers," and declared: "In *Pennsylvania v. Mimms* we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous." (Citation omitted and emphasis added). Given these pronouncements in *Mimms*, *Rakas*, and *Long*, there is little

doubt that the Court itself views the *per se* rule of *Mimms* as covering both drivers and passengers of lawfully stopped vehicles.

II.

THE FEDERAL AND STATE COURTS THAT HAVE CONSIDERED THE ISSUE ARE IN CONFLICT.

Notwithstanding this Court's repeated suggestions that the *Mimms* rule applies to passengers, the lower federal and state courts that have addressed the question are sharply divided on its proper resolution. Most courts allow police as a matter of routine to order passengers out of a lawfully stopped vehicle. Far fewer courts require, as did the lower court in this case, that the officer harbor some level of particularized suspicion that a passenger poses a danger before the officer is permitted to act.

The Court of Appeals for the Ninth Circuit typifies the many courts that recognize the automatic right of police to order passengers out of lawfully stopped vehicles. In its recent decision in *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323 (9th Cir. 1995), the court analyzed the issue by commenting preliminarily that, given *Mimms*, it was "not writ[ing] on a blank slate." *Id.* at 1326. The court reasoned that the weighty governmental interest in protecting police from the danger inherent in confronting a driver is "equally grave when a police officer confronts passengers; indeed, it may be more dangerous to have the driver outside the vehicle while one or more passengers are left inside." *Id.* at 1327. In this regard, the court pointed out that the governmental interest in officer safety

does not flow from the driver as a result of being stopped for a traffic violation, but from the danger inherent in approaching seated people in a vehicle, whether driver or passengers. *Id.* at 1327-28. Given all of this, the court concluded that the *Mimms* rule "is equally applicable to passengers in a vehicle as it is to drivers." *Id.* at 1327.

Like the Ninth Circuit, other courts are of the view that the *Mimms* rule applies with equal, or even greater, force to passengers because the potential danger to the officer increases when passengers are present during a traffic stop. *See State v. Landry*, 588 So. 2d 345, 347 (La. 1991) (likelihood of danger to police may be greater when there are a number of occupants); *People v. Martinez*, 187 Mich. App. 160, 167 n.5, 466 N.W.2d 380, 384 n.5 (1991) ("[O]ne could even advance the argument that the passenger presents a greater threat to the officer than does the driver, since the officer's attention in the traffic stop is going to be focused on the driver, and he may not be immediately aware of the activities of the passenger, including the possibility that the passenger may retrieve a gun and assault the officer."), *vacated on other grounds*, 439 Mich. 986, 483 N.W.2d 868 (1992); *Commonwealth v. Brown*, 439 Pa. Super. 516, 528, 654 A.2d 1096, 1102 (due to nature of potential danger, officer's concerns increase with the number of occupants in a car), *appeal denied*, 664 A.2d 972 (Pa. 1995). *See also United States v. McCoy*, 824 F. Supp. 467, 474 (D. Del. 1993) (upholding officer's command that occupants exit vehicle and commenting that "it would be incongruous to permit an officer to order the driver out of his vehicle pursuant to a lawful stop in order to diminish the likelihood that the officer will be attacked with a concealed weapon, but not to permit the officer to order the passengers out of a

lawfully stopped vehicle, when those passengers present the same risk of attack and have the same access to concealed weapons").

Other courts as well have extended *Mimms* to apply to passengers in vehicles that are the subject of lawful traffic stops. *E.g.*, *Doctor v. State*, 573 So. 2d 157, 159 (Fla. App. 1991), *rev'd in part on other grounds*, 596 So. 2d 442 (Fla. 1992); *Warr v. State*, 580 N.E.2d 265, 267 (Ind. App. 1991); *Commonwealth v. Pappalardo*, 10 Mass. App. 897, 409 N.E.2d 815, 816 (1980); *State v. Reynolds*, 753 S.W.2d 1, 2 (Mo. App. 1988); *People v. Robinson*, 74 N.Y. 2d 773, 775, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 733-34, *cert. denied*, 493 U.S. 966 (1989); *State v. Gilberts*, 497 N.W.2d 93, 96 (N.D. 1993); *State v. Soares*, 648 A.2d 804, 806 (R.I. 1994); *Bethea v. Commonwealth*, 14 Va. App. 474, 476-78, 419 S.E.2d 249, 250-52 (1992) (*en banc*), *aff'd on other grounds*, 245 Va. 416, 429 S.E.2d 211 (1993). *See also State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (1991) (holding that *Mimms* authorizes police to order passengers out of a vehicle and, by like reasoning, authorizes police to order passengers back into lawfully stopped vehicles).[5]

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[5] Still other courts—federal and state alike—have not hesitated to comment that *Mimms* is applicable to all occupants of lawfully stopped vehicles, even though the issue was not directly before the court for decision. *E.g.*, *United States v. Powell*, 929 F.2d 1190, 1195 (7th Cir.), *cert. denied*, 502 U.S. 891 (1991); *United States v. Sanders*, 631 F.2d 1309, 1312 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); *People v. Melgosa*, 753 P.2d 221, 225 (Colo. 1988); *State v. Dukes*, 209 Conn. 98, 122, 547 A.2d 10, 22 (1988); *Thomas v. United States*, 553 A.2d 1206, 1207 n.7 (D.C. 1989); *People v. Salvator*, 236 Ill. App. 3d 824, 840, 602 N.E.2d 953, 963

A minority of courts rejects the notion that the *Mimms* analysis justifies automatically ordering passengers out of a stopped vehicle, and requires instead that the stopping officer articulate some specific justification for having passengers alight. The present case is perhaps the paradigm of this view. Authored by Judge Charles E. Moylan, Jr., a noted Fourth Amendment authority, this case holds that passengers do not stand in the same position as drivers, because the passenger has broken no law; plays no role in the exchange between the officer and driver; has a higher expectation of privacy; and should be able to walk away from the scene unless the officer has a legitimate reason to detain him. (App. 20a).

Professor LaFave shares this view and suggests that in a routine traffic stop, as opposed to a stop of a car based on suspicion of more serious criminal activity involving use of the vehicle, police should not be given "the discretion to order the passenger from the automobile without requiring any explanation of the officer's actions (other than a blanket concern for personal safety in all situations)." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(a) at 268 (3d ed. 1996) (*quoting State v. Williams*,

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(1992), *appeal denied*, 148 Ill. 2d 651, 610 N.E.2d 1273 (1993); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn. 1978); *State v. Williams*, 94 Ohio App. 3d 538, 544, 641 N.E.2d 239, 243, *dismissed*, 70 Ohio St. 3d 1446, 639 N.E.2d 114 (1994); *State v. Richardson*, 156 Wis. 2d 128, 143, 456 N.W.2d 830, 836 (1990). *See also United States v. Hill*, 60 F.3d 672, 682 (10th Cir.) (holding that *Mimms* applies to passenger where passenger is a suspect, but also pointing out that, in *Long*, this Court indicated that *Mimms* permits police to order *persons* out of an automobile during a traffic stop), *cert. denied*, 116 S. Ct. 432 (1995).

366 So. 2d 1369, 1374 (La. 1978)). To conclude otherwise, LaFave suggests, "is to abandon the requirement of individualized inquiry into the reasons for an intrusion of the right to privacy." *Id.* (quoting *State v. Williams*, 366 So. 2d at 1374).[6]

The approach requiring some level of particularized justification before an officer may order a passenger out of a car in a routine traffic stop has been adopted by a small number of courts. *E.g., People v. Maxwell*, 206 Cal. App. 3d 1004, 1008-09, 254 Cal. Rptr. 124, 126-27 (1988); *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990); *State v. Smith*, 134 N.J. 599, 616-17, 637 A.2d 158, 166 (1994); *Johnson v. State*, 601 S.W.2d 326, 328-29 (Tenn. Crim. App. 1980). *See also State v. Schlosser*, 774 P.2d 1132, 1135 n.3 (Utah 1989) (noting that this Court expressly limited its *Mimms* holding to the driver of a vehicle lawfully stopped pursuant to a traffic violation). But even these courts do not agree on the quantum of suspicion necessary to order passengers out of cars. *Compare People v. Maxwell*, 206 Cal. App. at 1008, 254 Cal. Rptr. at 127 ("Even an inchoate and unparticularized suspicion that it would be better for the officer's safety for the passenger to alight is sufficient to justify such a request, because merely stepping out of the vehicle is a minimal intrusion upon privacy. . . .") (*quoting People v. Beal*, 44 Cal. App. 3d 216, 221, 118 Cal. Rptr. 272 (1974)) *and State v. Smith*, 134 N.J. at 618, 637 A.2d at 167 (requiring only that officer point to specific and articulable facts that would warrant "heightened awareness of danger"

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[6] *State v. Williams* has since been overruled by the Supreme Court of Louisiana in *State v. Landry*, 588 So. 2d 345, 347 (La. 1991), cited at page 11, *supra*.

justifying order that occupants alight) *with State v. Becker*, 458 N.W.2d at 607 (police officer needs articulable suspicion that passenger violated the law before ordering passenger out of car).

In short, the courts are in conflict not only on the question whether any level of case-specific justification is required before an officer may order a passenger out of a car during a routine traffic stop, but on the question of what quantum of suspicion, if any, is necessary. Given the importance and frequency of occurrence of the issue, the existing conflict warrants this Court's resolution.

III.

THIS COURT SHOULD ADOPT A BRIGHT-LINE RULE IN RESOLVING THE ISSUE.

In resolving the issue before it, this Court should reject the minority approach adopted by the court below. Instead, to assure officer safety and ease of application, the Court should extend the *Mimms* bright-line rule to passengers. To do so would be consistent with the Court's earlier statement in an analogous context that "the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *New York v. Belton*, 453 U.S. 454, 458 (1981) (*quoting* Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S. CT. REV. 124, 142). Currently, there is no "single, familiar standard . . . to

guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* (*quoting Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). A bright-line rule is all the more necessary given that during traffic stops "the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger. . . .'" *Michigan v. Long*, 463 U.S. at 1052 (*quoting Terry v. Ohio*, 392 U.S. 1, 28 (1968)). This case presents the Court with the ideal vehicle for adopting such a standard.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland.

Respectfully submitted,

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February 9, 1996

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APPENDIX A

Court of Special Appeals of Maryland.

No. 113, Sept. Term, 1995

STATE OF MARYLAND

v.

JERRY L. WILSON

August 30, 1995

Argued before WILNER, C.J., and MOYLAN, and HARRELL, JJ.

MOYLAN, Judge.

The appellee, Jerry Lee Wilson, was indicted by the Baltimore County Grand Jury for the possession of cocaine with intent to distribute and for related narcotics and conspiracy offenses. He filed a pretrial motion to suppress physical evidence on the ground that it had been obtained in violation of his Fourth Amendment right to be secure from unreasonable searches and seizures. On November 23, 1994, Judge Thomas J. Bollinger conducted a suppression hearing and reserved his decision on the motion. On January 10, 1995, Judge Bollinger granted the appellee's motion to suppress the evidence. Under the provisions of Md.Code (1995 Repl.Vol.), § 12-302(c)(3) of the Cts. & Jud. Proc. Article, the State has appealed that

suppression order.

The Issue

The single issue before us is very narrow. When a police officer makes a routine traffic stop, does his automatic right to order the driver to exit the vehicle, a procedure deemed to be constitutionally reasonable by *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), also extend to passengers in the stopped vehicle?

The Factual Background

The only witness to testify at the suppression hearing was Trooper David Hughes of the Maryland State Police. At approximately 7:30 P.M. on June 8, 1994, Trooper Hughes observed a white 1994 Nissan Maxima driving southbound on I-95 at what appeared to be a high rate of speed. The trooper pulled into the lane behind the Maxima and "paced" it for approximately one mile. It was going 64 miles per hour in a 55 miles-per-hour zone. He also observed that there was no regular license tag on the front or rear of the car, except that on the back there was "a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car." Officer Hughes activated his lights and siren, but the Maxima continued to drive, with Trooper Hughes behind it, for approximately one-and-one-half miles before finally stopping in Baltimore City.

Both during the pursuit and then in approaching the Maxima after it had stopped, Trooper Hughes observed that the car had three occupants. During the pursuit, the two passengers had turned and looked at him several times and had on several occasions ducked below the sight level and then reappeared.

As Trooper Hughes started to approach the Maxima on

foot, he saw that the driver had spontaneously exited the vehicle. The trooper directed the driver to step back toward him and the two met at a point between their respective vehicles. Trooper Hughes advised the driver, a Mr. McNichol, why he had been stopped and asked McNichol for his license and registration card. McNichol explained that he was coming from Connecticut and going toward South Carolina. He produced a valid Connecticut driver's license. McNichol further indicated that the rental papers for the car were in the vehicle. It was at that point that Trooper Hughes instructed McNichol to return to the vehicle to retrieve the rental documents. McNichol got in the vehicle and sat in the driver's seat.

Throughout the initial encounter, Trooper Hughes had observed that McNichol was extremely nervous. He appeared at times to be trembling and answered every question with a question. Trooper Hughes had also observed that the front seat passenger, the appellee Jerry Lee Wilson, was sweating and extremely nervous.

It was after McNichol had reentered the car that Trooper Hughes ordered Wilson out of it. As Wilson complied with the trooper's direction to walk back closer to the police vehicle, what appeared to be (and, indeed, turned out to be) crack cocaine fell to the ground. Trooper Hughes drew his weapon and placed Wilson under arrest. When Trooper Hughes was asked why he had directed Wilson to exit the vehicle, he replied:

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

The single issue before Judge Bollinger was whether

Trooper Hughes violated Wilson's Fourth Amendment right against having his person seized unreasonably when he ordered Wilson to step out of the vehicle.

A False Trail

Both at appellate argument and in appellate brief, the State urged, as an alternative rationale, that Trooper Hughes had articulable or particularized suspicion under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), either to "stop" Wilson for questioning or to "frisk" Wilson for weapons. Under either set of circumstances, the minimal seizure of Wilson's person occasioned by ordering him from the car would have been reasonable. We reject the State's alternative rationale, however, for several reasons.

In the first place, the State never urged such a basis for the exit-order at the suppression hearing. Judge Bollinger was not called upon to rule whether there was articulable suspicion either for a *Terry* "stop" or for a *Terry* "frisk" and, indeed, he made no such rulings.

With respect to this alternative rationale, the State is even more bereft. Articulable suspicion, for either a stop or a frisk, requires not simply the external circumstances that would justify such particularized suspicion. It requires, in addition, that the officer purporting to act on the basis of such suspicion actually *articulate* such a purpose and such a basis for action. *Gibbs v. State*, 18 Md.App. 230, 239–42, 306 A.2d 587 (1973).

What must be *articulated* to justify a *Terry* "stop" is particularized suspicion that a crime has occurred, is then occurring, or is about to occur. A "stop," unlike a "frisk," is crime-related, not weapon-related. The societal purpose served by a *Terry* "stop" is the prevention or detection of crime. The justification for a "stop," therefore, must be

framed and phrased in terms of suspected crime. It is, moreover, the officer who must do the articulating, not the Attorney General by way of appellate afterthought. Trooper Hughes articulated nothing with respect to any crime that he suspected Wilson of being involved in. The absence of an articulated basis for a *Terry* "stop" is as absolute here as it was in *Gibbs v. State*:

> *Officer Stewart*, in the case at bar, *articulated absolutely nothing* as to what crime or type of crime he reasonably suspected the appellant of having engaged in, of then engaging in, or of being about to engage in. (Emphasis supplied.)

18 Md.App. at 241, 306 A.2d 587.

With respect to a possible justification for the exit-order based on the notion that Trooper Hughes was somehow undertaking a *Terry* "frisk," the overarching fact is that Trooper Hughes never remotely articulated having entertained any such purpose. He did, to be sure, express some fear that "possibly there could be a handgun in the vehicle." The ostensible purpose for ordering Wilson out of the car, however, was to take Wilson out of proximity to such a possible weapon rather than to frisk him for a weapon. Whatever Trooper Hughes was doing when he ordered Wilson out of the car, it was not in furtherance of any intent to conduct a frisk. In the absence of such a purpose, whether there might, in the abstract, have been a constitutional basis for a frisk is immaterial.

If these were not impediments enough, the State urges us to exercise our own independent constitutional appraisal on a *de novo* basis. Such appellate latitude is not available to us. Although we may exercise *de novo* review with respect to mixed questions of law and fact, we are enjoined to extend the more deferential "clearly erroneous" standard of review to the findings of the trial judge on purely factual questions. *Aiken v. State*, 101 Md.App. 557, 563, 647 A.2d 1229 (1994), *cert. denied*,

337 Md. 89, 651 A.2d 854 (1995); *State v. Jones*, 103 Md.App. 548, 606–11, 653 A.2d 1040 (1995). Judge Bollinger found as a first-level fact that Trooper Hughes possessed no fear that Wilson was armed. Judge Bollinger's conclusion was not that the external circumstances did not add up to articulable suspicion. That, indeed, would have been a finding on a mixed question of law and fact and would be subject to *de novo* review. Judge Bollinger's finding, by way of contrast, was that Trooper Hughes did not even possess such a suspicion. That is a finding of pure fact that can be overturned only if clearly erroneous.

In part because Trooper Hughes did not order all three individuals out of the Maxima initially, and in part because McNichol was freely permitted to reenter the vehicle, Judge Bollinger concluded that Trooper Hughes's action was not a preventative or preemptive measure intended to neutralize the risk of harm from offensive weapons. His conclusion was not that there was no basis for a reasonable suspicion that Wilson was armed and dangerous, but rather that Trooper Hughes entertained no such suspicion, reasonable or unreasonable:

> In this case the officer's experience is 13 months as a trooper and this Court finds that when the officer allowed the driver of the vehicle to return to the car to obtain the rental documents he could not have had a reasonable suspicion that the person was armed and dangerous; and therefore, any future intrusion into the right of the occupants of the car are violative of one's Fourth Amendment proscription of unreasonable searches and seizures.

As first-level fact finding, inevitably influenced by Judge Bollinger's observation of Trooper Hughes's demeanor and manner of testifying and by Judge Bollinger's assessment of Trooper Hughes's credibility, this is the type of thing that the trial judge is far more competent to weigh and to

decide than we would be on the basis of a cold record. This, we hold, is a finding that was not clearly erroneous.

It is as important, perhaps, to note what we do not hold as it is to note what we do. Had Judge Bollinger found that Trooper Hughes had reason to fear that Wilson might be in possession of a weapon and had ordered Wilson out of the vehicle in order to frisk him for a weapon, we are *not* holding that such a conclusion and such an action on the trooper's part would have been unreasonable. That, however, is not the decision before us for review. Judge Bollinger found, to the contrary, that the trooper had no such fear and we simply hold that Judge Bollinger was not clearly erroneous in so finding.

Pennsylvania v. Mimms

If the State's argument that it was reasonable for Trooper Hughes to order Wilson out of the car, therefore, is somehow to fly, it must lift off from the doctrinal launching pad of *Pennsylvania v. Mimms* and not from that of *Terry v. Ohio*.

It is treacherous to attempt to extract too much meaning from *Pennsylvania v. Mimms*. It is a six-page, unsigned opinion explaining a summary disposition reached without benefit of oral argument. One must be careful not to read more meaning into such an opinion than the authors ever intended to put there. The simple holding of *Pennsylvania v. Mimms* is that whenever a police officer stops a vehicle for a traffic violation, even of the most minor variety, it is reasonable for the officer to order the driver to alight from the vehicle before the officer proceeds to inspect the driver's license and registration card, to question the driver, to observe the driver with respect to sobriety, to issue a traffic citation, or to take other appropriate action.

In the *Mimms* case itself, two Philadelphia police officers had observed Harry Mimms driving an automobile

with an expired license plate. They stopped the car for the purpose of issuing a traffic citation. One of the officers approached the vehicle and asked Mimms to step out of the car and to produce his owner's card and operator's license. When Mimms did so, one of the officers noticed a large bulge under his sports jacket. Fearing that the bulge might be a weapon, the officer frisked Mimms and discovered in his waistband a .38 caliber revolver loaded with five rounds of ammunition. Mimms was arrested and convicted for carrying a concealed weapon and for carrying a firearm without a license.

In its opinion, the Supreme Court made it clear that its focus was very narrow. There was no question about the propriety of the initial stop of the vehicle. 434 U.S. at 109, 98 S.Ct. at 332. Nor was there any question about the propriety of the ultimate frisk of Mimms for weapons, because the observation of the bulge furnished articulable or particularized suspicion that a weapon might be present, to wit, an independent basis for that further intrusion. The only issue before the Supreme Court was the propriety of the intermediate act of ordering Mimms to step out of the vehicle after it had been stopped:

> [W]e need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment. This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle or from the later "pat-down," but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

434 U.S. at 109, 98 S.Ct. at 332.

After balancing the societal interest of protecting the officer from harm against the intrusion into the Fourth Amendment interests of the driver, the Court concluded that it is reasonable for an officer to order a driver to alight

from the vehicle whenever the vehicle is lawfully stopped for a traffic violation. The holding was very clear that that prerogative is automatic under such circumstances and that no individual or particularized suspicion that the driver might be armed is involved. The police practice under review in *Mimms* was always to order the driver to alight from the vehicle:

> The State freely concedes the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. *It was apparently his practice to order all drivers out of their vehicles as a matter of course* whenever they had been stopped for a traffic violation. (Emphasis supplied.)

434 U.S. at 109–10, 98 S.Ct. at 332.

The police prerogative *vis-a-vis* a stopped driver is plenary and automatic. Once the lawfulness of the initial stop of the vehicle is established, nothing more need be shown on a case-by-case basis to justify the incremental intrusion of ordering the driver out of the vehicle. In the case now before us, Trooper Hughes had made a lawful stop of the Nissan Maxima on I–95. He was, thereby, automatically entitled to order the driver out of the car. It turned out, coincidentally, to be unnecessary because the driver had already alighted spontaneously.

The appellant Wilson, however, was not the driver but only one of the passengers. Did or did not the automatic police prerogative extend to him?

Mimms Did Not Deal With Passengers

The *Mimms* opinion was completely silent on the police prerogative, if any, *vis-a-vis* a passenger. There had coincidentally been a second occupant of Harry Mimms's vehicle who, it turned out, was carrying a .32 caliber revolver. Once that narrative fact was mentioned,

however, the armed passenger dropped totally from sight and the opinion does not further allude to him even obliquely. The Supreme Court, indeed, went out of its way to disclaim any consideration of the rights or vulnerabilities of passengers:

> The State does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation. Rather, it only argues that it is permissible to order the driver out of the car.

434 U.S. at 110 n. 5, 98 S.Ct. at 332 n. 5.

The State argues, however, that the automatic police prerogative *vis-a-vis* a driver should be equally automatic *vis-a-vis* any other occupant of a stopped vehicle. The State actually makes two arguments in support of this proposition, one based on legal authority and the other based on the inherent logic of drawing the parallel.

A. The Argument Based on Legal Authority:

The State does not simply argue that the principle of *Pennsylvania v. Mimms* should be extended to passengers; it argues that the *Mimms* principle *already has* been extended to passengers. It cites as the extending authorities the Supreme Court opinions in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) and *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and our own opinion in *Derricott v. State*, 84 Md.App. 192, 578 A.2d 791 (1990), *rev'd on other grounds*, 327 Md. 582, 611 A.2d 592 (1992).

What significance, if any, has *Michigan v. Long*, *Rakas v. Illinois*, or our own *Derricott v. State* in resolving the issue now before us. If nothing else, they afford an occasion for serious philosophic reflection on the present state of *stare decisis*. In looking to the case law as a source of legal authority, there seems to be an almost

epidemic trend among lawyers generally–civil and criminal, on the prosecution side and the defense side of the trial table alike, and even among some judges–to forget the most elemental ABC's of first-semester, first-year Legal Method. Everything said by a judge or by a court is not of equal weight. Were the three cases that we are about to examine offering us three thoroughly considered holdings, their authority would stand on undeniable bedrock. Were they three well considered, well researched, and well analyzed instances of even deliberate and conscious *dicta*, they would still be standing on firm, persuasive ground. If, on further examination, however, they turn out to be no more than three careless, casual, and passing instances of the most *obiter* of *dicta*, they should represent no more to us than the glib blandishments of a snake oil salesman, no matter who wrote them.

In *Michigan v. Long*, the Supreme Court was not remotely dealing with a *Pennsylvania v. Mimms* situation. It was a case, rather, where there was undeniable articulable suspicion that an individual might be armed and dangerous. The only issue before the Court was whether a *Terry* "frisk" could extend geographically from the suspect himself into the passenger compartment of the automobile from which he had just alighted. *Pennsylvania v. Mimms* was cited only to illustrate that an automobile can be the source of a dangerous weapon. The reference to *Mimms* consisted of the following:

> In *Pennsylvania v. Mimms*, we held that police may order *persons* out of an automobile during a stop for a traffic violation, and may frisk those *persons* for weapons if there is a reasonable belief that they are armed and dangerous. Our decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." (Citation omitted.) (Emphasis supplied.)

463 U.S. at 1047-48, 103 S.Ct. at 3480.

The *Mimms* principle itself was not being considered, let alone some more subtle ultra-*Mimms* distinction between driver and passenger. The only significance that could conceivably be derived from this quotation for present purposes is that twice the word "persons" appeared in the plural rather than in the singular. Clearly, there was involved no consideration of the police prerogative *vis-a-vis* a passenger as opposed to the prerogative *vis-a-vis* a driver, for in *Michigan v. Long* there was only one suspect involved–the driver himself. The casual use of the plural rather than the singular in this content does not in any way support the doctrinal weight the State seeks to place upon it. Every word that is uttered in a legal opinion is not legal authority.

The other two instances illustrate even more pointedly why the fundamental distinction between holdings and *dicta* should be rigorously maintained. In the Anglo-American common law tradition of judge-made law, it is, when we are meticulously precise about the matter, the *decision* of an appellate court that has, within the appropriate jurisdictional framework, binding precedential authority, and not necessarily the *opinion* announcing the decision. Generally speaking, however, when it comes to the actual holding of a case, the decision of a court and the opinion of the court announcing the decision are coterminous.

The precedential weight of a holding is predicated in large measure on its status as the *deliberate and considered judgment* of an entire collegiate court, including the opinion writer, on the issue before it that must be decided. Each member of an appellate court peers in with painstaking scrutiny not only on the decision itself but on the framing of the holding that announces the decision. The articulation of the holding passes through a stern editorial process that insists that every "i" be dotted, every "t" be crossed, every word be carefully chosen, and

every far-flung repercussion be sagely anticipated. A holding, therefore, has earned the authoritative weight we give it.

The holding, however, consists of no more than a few sentences or, at most, a few paragraphs, generally located near the end of what may be a twenty or thirty-page opinion. When it comes to the composition of the opinion leading up to the holding, the collegiate editorial reins are, although not totally relaxed, far looser. There is a wide stylistic range within which the opinion writer may freely express a particular legal philosophy; a special analytic approach to problem solving; possibly idiosyncractic reactions to certain arguments; or, above all, an individualistic writing personality. The active collegiate participation in the formulation of a holding retreats to gentle stylistic suggestion when it comes to the writer's modality of expression. It is not uncommon for a panel member to subscribe to an opinion, notwithstanding an occasional wince of pain or smile of indulgent tolerance along the way. The point is that everything said in an opinion–the *dicta*–is not entitled to the same weight as is the holding of the Court.

Well-considered *dicta*, of course, is sometimes very good and, therefore, of significant persuasive weight. That is a far cry, however, from giving persuasive weight to every hurried word that may appear in the course of an opinion. The opinion-writing process is frequently a high volume production line and it should be obvious that every syllable is not chiseled in marble. Inadvertent mistakes inevitably creep in. This is unremarkable, unless we seize upon the mistakes, extend them a precedential weight to which they are not entitled, and then follow them as false gods. The citations to *Rakas v. Illinois* and *Derricott v. State* at least flirt with just such precedential heresy.

The citation to *Rakas* is to a footnote in a concurring opinion. The issue for decision in *Rakas* had nothing to

do with the police prerogative to order a driver or a passenger to alight from an automobile. It dealt exclusively with the standing of a "mere passenger" to raise a Fourth Amendment challenge to the search of someone else's automobile. The footnote in the concurring opinion was responding to the dissent in the case and was making the point that an automobile generally, with no distinction even considered between driver and passenger, enjoys a lesser expectation of privacy than do other places, such as homes. *Pennsylvania v. Mimms* was used simply to illustrate that point:

> Last Term, this Court determined in *Pennsylvania v. Mimms* that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made. (Citation omitted.)

439 U.S. at 155 n. 4, 99 S.Ct. at 436 n. 4 (concurring opinion by Powell, J.). The deceptively broad reference to "passengers" was simply wrong. It should, more carefully, have been a more limited reference to "drivers." That distinction, however, was not remotely involved in the discussion and should not be given a significance that was never intended.

The same sort of inadvertent mistake infected our opinion in *Derricott v. State*. As we worked our way toward the critical issue actually before us in that case, we described, almost as passing landscape, the unquestioned legitimacy of an initial traffic stop and then the unquestioned legitimacy of ordering the stopped driver to alight from his vehicle. Clearly, we were not dealing with any distinction between a driver and a passenger, because there was no passenger in the Derricott vehicle. No one other than the driver was involved. Nonetheless, our characterization of *Pennsylvania v. Mimms* did read:

> *Pennsylvania v. Mimms* established unequivocally that when the police have legitimately stopped an automobile, for a traffic offense or for any other reason,

> they are automatically entitled to order the driver *and/or any of the passengers* to alight from the vehicle. (Citation omitted.) (Emphasis supplied.)

84 Md.App. at 197-98, 578 A.2d 791. The overly broad inclusion of the phrase "and/or any of the passengers" was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition.

The writer of the concurring opinion in *Rakas* and the writer of this Court's opinion in *Derricott* did exactly the same thing, as opinion writers sometimes do. On an immaterial issue and casually in passing, they characterized *Pennsylvania v. Mimms* as they remembered it, but they remembered it wrongly. They did not put down a pen in mid-sentence and run to the United States Reports for the obvious reason that the passing reference was not in any way the focus of consideration. To be sure, a judge said the words. The words, however, in such a context, should be given the weight they would be given if the judge had said them in a law review article or in a newspaper column or in a talk to the Kiwanis Club. In this same regard, *see also Harris v. State*, 81 Md.App. 247, 300, 567 A.2d 476 (1989), *rev'd on other grounds*, *Harris v. State*, 324 Md. 490, 597 A.2d 956 (1991).

In summation, *stare decisis* is ill served if readers hang slavishly on every casual or hurried word as if it had bubbled from the earth at Delphi. *Obiter dicta*, if noticed at all, should be taken with a large gain of salt.[1]

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[1] Incredibly, several jurisdictions have apparently extended the *Mimms* automatic police prerogative to passengers simply by relying on this *dicta* from *Rakas v. Illinois* and *Michigan v. Long*. *United States v. McCoy*, 824 F.Supp. 467 (D.Del.1993); *State v. Soares*, 648 A.2d 804 (R.I.1994). This is not to say that, by random chance, they may not have hit on a proper resolution. It is a close question that could easily go

(continued...)

B. The Argument Based on Logic:

In urging that the *Mimms*-based police prerogative *vis-a-vis* a stopped driver should be extended to cover passengers in a stopped vehicle as well, the State is on much firmer ground as it makes its argument based on the inherent logic of the parallel. In deciding *Mimms* as it did, the Supreme Court engaged in a balancing exercise. It measured the governmental or societal interest that would be furthered by the prerogative against the privacy interest that would be compromised by it. On balance, it deemed the prerogative, *vis-a-vis* a driver, to be reasonable.

The same general factors would go into the weighing process of whether it would be reasonable automatically to subject a passenger to the same police procedure. We accept the State's invitation to engage in such a weighing exercise. We point out, as we do so, that we are assessing the reasonableness of subjecting a passenger to the *automatic* police prerogative of ordering him out of an automobile, just as automatically as in the case of the driver, and not to such a prerogative when conditioned on some sort of particularized or individualized suspicion.

On the societal-interest pan of the balance scale, the Supreme Court placed two factors. The heavy factor was the interest in protecting the officer from harm at the hands of the driver. A secondary factor was the interest in protecting the officer from the risk of harm from oncoming traffic. In referring to that secondary factor, the Court observed:

> The hazard of accidental injury from passing traffic to

---

[1](...continued)
either way. This is only to say that the avenue by which they arrived at their resolution (or the rationale seized upon to explain it) was analytically flawed.

> an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.

Mimms, 434 U.S. at 111, 98 S.Ct. at 333.

Assuming that stopped vehicles generally pull to the right-hand curb of the street or the right-hand shoulder of the road and that it is the driver's side that is thereby exposed to traffic, this factor obviously does not come into play when considering the officer's position *vis-a-vis* a passenger. In a routine traffic stop, there would, indeed, be few occasions when an officer would even have any interest in standing outside the passenger's window and talking to a passenger. Since this societal interest, however, was clearly little more than a makeweight, its absence from the balance in the case of a passenger detracts little from the governmental interest being weighed.

The heavy and predominant societal interest that persuaded the Supreme Court to decide *Pennsylvania v. Mimms* as it did was the concern for minimizing the risk of harm to an officer from an armed and dangerous driver:

> Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification–*the safety of the officer–is both legitimate and weighty*. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." And we have specifically recognized the inordinate risk

confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached *a suspect seated in an automobile*." We are aware that not all these assaults occur when issuing traffic summons, but we have before expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." (Footnote and citations omitted.) (Emphasis supplied.)

434 U.S. at 110, 98 S.Ct. at 333.

Assuming the worst-case scenario, as the Supreme Court did with a driver and as we now do with a passenger, it is self-evident that an armed and dangerous passenger poses just as great a threat to an officer as does an armed and dangerous driver. In looking, therefore, exclusively at the "benefit" side of this cost-benefit analysis, we conclude that the societal benefit or societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver.

A balancing process, however, is an exercise in relativity. A cost-benefit analysis requires that we compare the social "costs" to driver and passenger, respectively, just as we have compared the respective benefits of protecting the officer from each of them. It is here that the parallel urged by the State falters. It is here that a significantly heavier weight on the "cost" side of the scale in the case of a mere passenger produces, in our judgment, a different result.

In *Mimms*, the Supreme Court made it very clear that the social cost in terms of interfering with a citizen's liberty interest was a possibly counter-balancing factor

that had to be considered:

> The touchstone of our analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." Reasonableness, of course, depends "on *a balance between the public interest and the individual's right to personal security* free from arbitrary interference by law officers." (Citation omitted.) (Emphasis supplied.)

434 U.S. at 108-09, 98 S.Ct. at 332.

Apparently critical to the Supreme Court's decision that a police officer's prerogative to order a stopped driver out of a car could be automatic rather than conditioned on some showing of particularized suspicion was its conclusion that the social "cost" in terms of interfering with the driver's liberty interest was minimal, if not nugatory. Not only is the automobile itself stopped for a traffic infraction, but the driver is subject to further detention on an *in personam* basis. The driver is not permitted to walk away from the scene and disappear into the sunset. The driver is required to furnish the officer with evidence of a valid operator's license and valid registration for the vehicle, subject to penalties for failure to do so. The driver is further detained while the officer checks out the identifying data over a police radio. The driver is subject to receiving a traffic ticket or citation, if not, indeed, to custodial arrest for the infraction. All this is well settled law before the *Pennsylvania v. Mimms* considerations even come into play. With the detention of the driver already an undisputed *fait accompli*, the small incremental intrusion of having him alight from the vehicle while being detained was considered by the Supreme Court to be absolutely *de minimis*:

> Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which

was admittedly justified, but by the order to get out of the car. We think *this additional intrusion can only be described as de minimis*. The driver is being asked to expose to view very little more of his person than is already exposed. *The police have already lawfully decided that the driver shall be briefly detained*; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but *it hardly rises to the level of a* " *'petty indignity.'* " What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety. (Citation and footnote omitted.) (Emphasis supplied.)

434 U.S. at 111, 98 S.Ct. at 333.

A police interference with the presumptively unfettered liberty of a mere passenger, by contrast, cannot so easily be dismissed as "*de minimis*" or as something "hardly ris[ing] to the level of a petty indignity." The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. Once the automobile has slowed down sufficiently for the passenger safely to alight, moreover, the passenger is subject to no mandatory detention whatsoever. The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab.

Under the circumstances, a police intrusion on the Fourth Amendment interest of the passenger is not so minimal or merely incremental as to be of no more than slight significance in the weighing operation. To order a passenger to stay in the car or to get out of the car is the imposition of detention *per se*, and not a mere shift of the

location of already established detention.

The interest in officer safety, to be sure, continues to loom large, and this is admittedly a close question. All warrantless activity, however, is presumptively invalid, *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.E.2d 576 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and the burden is on the State to persuade us that it is reasonable. The State has not persuaded us that the automatic police prerogative, under *Pennsylvania v. Mimms*, to order a driver out of a vehicle should be extended to a passenger–*on an automatic basis*. That is the only issue before us in this case. Because Trooper Hughes's right to order Wilson out of the car was not automatic, the ruling of Judge Bollinger that the evidence be suppressed is affirmed.

Of a like mind on this issue is Professor Wayne LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 9.4(a) at 514-15 (2d ed. 1987):

> The state court in *Mimms* relied upon the earlier decision in *Commonwealth v. Pollard* [450 Pa. 138, 299 A.2d 233 (1973)], holding that when a vehicle is stopped for a traffic violation the police may not, by virtue of the stop alone, order the passengers in the vehicle to get out of the car. Although the issue presented by a *Pollard*-type fact situation is by no means an easy one, it would seem that *Pollard* was correctly decided and ought to be distinguished from *Mimms*. For one thing, it may fairly be said that "an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation," as the driver is detained for some violation by him or the car he is driving, while the detention of the passengers is no more than an inevitable incident of the stopping of the car. But more important, the potential danger to police engaged in traffic enforcement could be

adequately met if the police allowed passengers to remain in the stopped vehicle and instead had the driver accompany them to the police vehicle while the citation is prepared. (Footnotes omitted.)

See also Pennsylvania v. Mimms, 471 Pa. 546, 370 A.2d 1157, 1161 n. 1 (1977) (concurring opinion by Nix, J.), interpreting *Pennsylvania v. Pollard*, 450 Pa. 138, 299 A.2d 233 (1973):

> Our holding in that case was clearly limited to *passengers* occupying a vehicle. ("Further, as was previously noted, appellant was not the driver of the automobile.") The majority in the case at bar ignores this distinction, and thus completely overlooks the question left open in *Pollard* of whether an operator's expectation of privacy differs from that of an occupant of a vehicle detained for a traffic violation. (Emphasis in original.) (Citation omitted.)

In *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990), the Supreme Court of Iowa very articulately contrasted the situation of a driver, following a traffic stop, with the situation of a passenger:

> Nothing in either *Eis* [*State v. Eis*, 348 N.W.2d 224 (Iowa 1984)] or *Mimms* suggests that the privacy rights of the driver and passenger are the same at that stage. The pronouncements in *Mimms* concerning enhancement of the officer's safety were within the context of action which might be taken against a driver known to the officer to have violated the traffic laws. A person in that position is, in many states, including Iowa, technically subject to full custodial arrest. To the extent the officer elects to temporarily pursue a lesser intrusion, he has the right to condition that election on certain aspects of detention and search which are conducive to the officer's safety.
>
> The situation of the passenger, on the other hand, is entirely different. The fact that the driver was speeding

> authorizes the officer to stop the vehicle in which the passenger is riding. The resulting intrusion on the passenger which flows from the initial stop is an unavoidable consequence of action justifiably taken against the driver. Further intrusion on the passenger is not justified, however, unless some articulable suspicion exists concerning a violation of law by that person. (Citations omitted.)

See also Johnson v. State, 601 S.W.2d 326, 327-28 (Tenn.Crim.App.1980); *State v. Williams*, 366 So.2d 1369 (La.1978), *overruled by State v. Landry*, 588 So.2d 345 (La.1991).

Indeed, in *New York v. Class*, 475 U.S. 106, 117-18, 106 S.Ct. 960, 967-68, 89 L.E.2d 81, 92-93 (1986), the Supreme Court strongly suggested that its vesting a police officer with the automatic prerogative of ordering a driver out of a stopped car rested on three factors, one of which was the focusing of suspicion of wrongdoing specifically on the driver:

> In *Pennsylvania v. Mimms, the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle....* All three of the factors involved in *Mimms* and *[Michigan v.] Summers* [452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed. 2d 340 (1981)] are present in this case: the safety of the officers was served by the governmental intrusion; the intrusion was minimal; and *the search stemmed from some probable cause focusing suspicion on the individual affected by the search.* (Citations omitted.) (Emphasis supplied.)

By contrast, a traffic stop *per se* does not, without more, focus suspicion on a passenger as either a wrongdoer or as a possible source of danger to the officer.

A number of state courts, to be sure, have gone in the opposite direction on this issue and have extended the automatic police prerogative to the passenger as well as

the driver. Most have gone through the formal exercise of balancing the governmental interest in police safety against the degree of intrusion with the right of the passenger, although the analysis, generally speaking, has been very skimpy. *State v. Landry*, 588 So.2d 345, 347 (La.1991); *State v. Gilberts*, 497 N.W.2d 93, 95-96 (N.D.1993); *State v. Ferrise*, 269 N.W.2d 888, 890-91 (Minn.1978); *Warr v. State*, 580 N.E.2d 265, 267 (Ind.App.1991); *People v. Salvator*, 236 Ill.App.3d 824, 177 Ill.Dec. 58, 68, 602 N.E.2d 953, 963 (1992); *People v. Martinez*, 187 Mich.App. 160, 466 N.W.2d 380, 383-84 (1991), *vacated on other grounds*, *People v. Martinez*, 439 Mich. 986, 483 N.W.2d 868 (Mich.1992). A Florida appellate court reached the same conclusion without the benefit of any apparent analysis. *Doctor v. State*, 573 So.2d 157, 159 (Fla.App.1991).

Several decisions from the New York Court of Appeals leave New York's position somewhat in doubt. *People v. Robinson*, 74 N.Y.2d 773, 545 N.Y.S.2d 90, 91, 543 N.E.2d 733, 734 (1989), stated, without elaboration, that the *Pennsylvania v. Mimms* prerogative extended to passengers as well as to drivers. Its primary reliance, however, was on *People v. McLaurin*, 70 N.Y.2d 779, 521 N.Y.S.2d 218, 219-20 515 N.E.2d 904, 905-06 (1987), a case that explicitly refrained from holding that the prerogative was automatic and that based the propriety of the police order in that case on specific facts articulated by the police officer which warranted heightened apprehension on his part:

> *We need not now resolve whether the Mimms rationale would always justify an officer in ordering any or all of the passengers out of a lawfully stopped car,* for this record reveals that *the police conduct at issue here was predicated* not only on the traffic violation and the perceived threat of danger from the driver, but also *on the combination of additional factors*

> *that warranted apprehension as to the defendant passenger as well.* (Emphasis supplied.)

Virginia also appeared initially to be in the automatic extension of the police prerogative camp, but has since backed away from that position. In *Bethea v. Commonwealth*, 14 Va.App. 474, 419 S.E.2d 249, 250-51 (1992), the Court of Appeals of Virginia appeared to extend the prerogative to passengers automatically. On appeal, however, the Supreme Court of Virginia, in *Bethea v. Commonwealth*, 245 Va. 416, 429 S.E.2d 211, 213 (1993), expressly refrained from any automatic extension and rested its affirmance on the officer's actions on his ability to "point to specific and articulable facts" that justified his order for the passenger to alight from the vehicle:

> Nevertheless, *we need not determine whether the de minimis rationale utilized in Mimms is applicable to a passenger* in a vehicle when the initial vehicle stop is predicated solely on matters pertaining to the driver. The facts of this case only require the application of the more general principle that *Fourth Amendment interests are not violated when a police officer can "point to specific and articulable facts which,* taken together with rational inferences from those facts, *reasonably warrant that intrusion."* (Emphasis supplied.)

What We Are Not Holding

By way of conscious, considered, and deliberate *dicta*, we hasten to point out what we are not holding. We are not holding that a police officer, as a matter of personal safety, may not order a suspect passenger out of a stopped automobile as readily as he may frisk a suspect on the street or in an automobile, and perhaps even more readily. We are simply holding that the prerogative is not automatic, but requires, for justification, some

individualized or particularized suspicion—just as in the case of a frisk for weapons. Where officer safety is concerned, the reasonableness threshold is low, but there is a threshold.

Of all the opinions we have found dealing with the distinction between the vulnerability of a driver to an order to alight from a car and the vulnerability of a passenger to the same order, far and away the most thoughtful and sensitive analysis is that of the Supreme Court of New Jersey, in *State v. Smith*, 134 N.J. 599, 637 A.2d 158 (1994). The New Jersey Supreme Court recognized, as we have done, that the danger posed to an officer is just as great at the hands of a passenger as at the hands of a driver. It is on the "cost" side of the balance scale that a difference is found. With respect to the greater intrusion that occurs in the case of a passenger, the *Smith* opinion reasoned:

> We turn now to the second prong of the *Mimms* analysis and weigh the intrusion into the passenger's liberty occasioned by the trooper's order to a passenger to get out of the car as a routine safety precaution. *Ordering a passenger to leave the vehicle is distinguishable from ordering the driver to get out of the vehicle because the passenger has not engaged in the culpable conduct that resulted in the vehicle's stop.* Although the State's interest in safety remains the same whether the driver or the passenger is involved, requiring a passenger to alight from a car in the course of a routine traffic stop represents a greater intrusion on a passenger's liberty than the same requirement does on a driver's liberty. With respect to the passenger, *the only justification for the intrusion on the passenger's privacy is the untimely association with the driver* on the day the driver is observed committing a traffic violation. Because the passenger has not engaged in culpable conduct, the passenger has a legitimate

> expectation that no further inconvenience will be occasioned by any intrusions beyond the delay caused by the lawful stop. *The intrusion on the passenger's privacy*, therefore, *is greater than it is on the driver's privacy.* (Emphasis supplied.)

637 A.2d at 165-66.

The *Smith* Court recognized that although the intrusion on a passenger was not a major intrusion, it was enough to require some specific justification under the Fourth Amendment:

> [T]he primary concern of the *Mimms* rule–officer protection–remains the same whether a passenger or a driver is involved.
>
> ... Applying the balancing test to passengers, however, we conclude that the scale tips against a *per se* rule that a passenger may always be ordered out of a vehicle lawfully stopped for a routine traffic violation. Courts have long held that some quantum of individualized suspicion is a prerequisite to a constitutional search and seizure. Although we do not think that a passenger being routinely asked to step out of a lawfully detained vehicle suffers a major intrusion, the request nevertheless amounts to an intrusion. Therefore, we do not think reasonable the proposition that auto passengers should be routinely ordered to get out of their cars after ordinary traffic stops.
>
> Hence, we conclude that the *Mimms per se* rule should not be applied automatically to passengers. (Citations omitted.)

637 A.2d at 166.

In turning its attention to the relatively low threshold of justification required to order a passenger out of a car, the *Smith* opinion reasoned that that justification might well be less than, and different from, the articulable suspicion that a crime was occurring, so as to justify a *Terry* "stop," or the articulable suspicion that the passenger was armed

and dangerous, so as to justify a *Terry* "frisk":

> We do recognize, however, that instances will surface in which police officers, with less than a reasonable suspicion that a passenger is engaged in criminal activity or is armed and dangerous, may reasonably order a passenger to step out of the car.

637 A.2d at 166.

What must be articulated to justifying ordering a passenger out of a car are specific and articulable facts that would support a "heightened caution" that the traffic stop was fraught with danger:

> Although the *per se* rule under *Mimms* permits an officer to order the driver out of a vehicle incident to a lawful stop for a traffic violation, we decline to extend that *per se* rule to passengers. Instead, we determine that *an officer must be able to point to specific and articulable facts that would warrant heightened caution* to justify ordering the occupants to step out of a vehicle detained for a traffic violation. (Emphasis supplied.)

637 A.2d at 167.

The *Smith* Court made it clear, moreover, that a reasonable sensing of the need for "heightened caution," although constituting particularized suspicion, does not necessarily have to rise to the level of articulable suspicion necessary for a *Terry* "frisk":

> Although the requirements for ordering a passenger from a vehicle are more stringent than those for ordering a driver out under the *Mimms per se* rule, *the standard that justifies an order to a passenger to step out of a vehicle does not rise to the Terry standard that must be met for a protective pat-down.* We adopt this lesser standard because of the need to protect police officers and because of the minimal intrusion the requirement to exit the car imposes on the passenger.
>
> To support an order to a passenger to alight from a vehicle stopped for a traffic violation, therefore, the officer need not point to specific facts that the occupants are "armed and dangerous." Rather, the officer need point only to *some fact or facts* in the totality of the circumstances *that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car.* (Emphasis supplied.)

637 A.2d at 167.

As it upheld the officer's ordering of the defendant-passenger out of the car, the *Smith* opinion provided an illustrative checklist of those types of observations that, although possibly falling short of articulable suspicion for a *Terry* "frisk," would justify the exercise of heightened caution in ordering a passenger out of a car:

> Had the vehicle pulled to the side of the road without incident, the trooper would have had no basis for requiring the passenger to step out of the car. Here, however, Trooper Cacina [sic] witnessed the apparent passing of objects between the front and back seats. Gacina testified that while following the car as it pulled to the shoulder, he "did not have a view of the most important thing that [he] needed to have a view of; and that is [the occupants'] hands."
>
> Thus the unusual movements, the early morning hour, and a largely deserted Turnpike are facts that warrant proceeding with extra caution in handling the occupants of the vehicle. The suspicious behavior by the occupants permitted the officer to exercise increased care to secure the scene even though the order that the passenger step out of the vehicle involved some intrusion on the passenger. That intrusion on the passenger's privacy interest is justified, however, because the suspicious movements in the car warranted a reasonably prudent officer's belief that the occupants

of the car might be armed. Trooper Cacina [sic] thought that he would best be able to control the scene if each of the passengers stepped out of the vehicle and remained in complete view of the officers. *Those circumstances were sufficient to justify Trooper Cacina's [sic] exercise of heightened caution in ordering Muhammad to step out of the car.* (Emphasis supplied.)

637 A.2d at 168.

In *People v. McLaurin*, 70 N.Y.2d 779, 521 N.Y.S.2d 218, 515 N.E.2d 904 (1987), the New York Court of Appeals found of significance in this regard the facts 1) that the area where the car was stopped was abandoned, 2) that the hour was late, and 3) that the car was moving slowly with no lights on:

Here, the area was abandoned, the hour was late, and the fact that the vehicle–having already violated the speed limit–was moving slowly with no lights on was sufficiently peculiar to awaken suspicion as to the activity of the occupants. *Under these circumstances, the officer was justified* in acting to secure the safety of both officers by imposing upon defendant the *de minimis* intrusion of ordering him–a person whose progress had already been impeded as a necessary incident to the lawful stop of the vehicle–to step out while his partner investigated the driver's credentials. (Citation omitted.) (Emphasis supplied.)

521 N.Y.S.2d at 220, 515 N.E.2d at 906.

In *Bethea v. Commonwealth*, 245 Va. 416, 429 S.E.2d 211 (1993), the Supreme Court of Virginia discussed the "specific and articulable facts" that caused the stopping officer in that case to be "reasonably concerned for his safety":

The totality of the circumstances we consider here included a traffic stop in a high-crime area; similar traffic stops by the same officers two days earlier in the

same neighborhood where weapons were discovered in a car; Bethea's actions immediately prior to the stop; Warren's 22 years of experience and his statements that Bethea's actions "startled" and "scared" him; and Warren's concern that Bethea might have weapons in the car. *These circumstances constitute "specific and articulable facts" which show that Warren was reasonably concerned for his safety* and believed that Bethea might have had access to weapons with which to assault him. These facts justified the intrusion on Bethea's Fourth Amendment rights that occurred when Warren asked him to get out of the car.

The fact that Warren did not immediately pat down or frisk Bethea does not belie Warren's concern for his own safety, as Bethea contends. *Warren stated that he felt safer with Bethea outside the vehicle,* not only because of Bethea's behavior, but also *because of his concern that there might be weapons in the car.* (Citation omitted.) (Emphasis supplied.)

429 S.E.2d at 213-14. *See also State v. Reynolds*, 753 S.W.2d 1, 2 (Mo.App.1988).

In *Search & Seizure: A Treatise on the Fourth Amendment*, § 9.4(a) at 516 (2d ed. 1987), Professor Wayne LaFave suggests two factors that may establish heightened suspieion that a passenger may be dangerous. One is suspicious movement on the part of the passenger. Another is where the stop is not for a routine traffic infraction but for more serious criminal activity, which may, *ipso facto*, be reasonable grounds to take preventive action with respect to the passengers as well as the driver:

But *where the car has been stopped because of a suspicion of more serious criminal activity involving use of that vehicle, there may be greater reason to require the passengers to alight.* In *United States v. Hensley*, where a car was stopped because of a flyer from another police department indicating the driver

was wanted for investigation of robbery and should be considered armed and dangerous, the Court summarily concluded that the officer's conduct in having both the driver and his passenger step out of the car was "well within the permissible range." Even if the suspected offense is not serious, *ordering a passenger out of the car for purposes of self-protection may sometimes be justified by the suspicious movements of the passenger.* (Footnotes omitted.) (Emphasis supplied.)

See also United States v. Hensley, 469 U.S. 221, 224, 105 S.Ct. 675, 677, 83 L.Ed.2d 604, 609 (1985).

The issue of whether these are appropriate guidelines, however, is not before us. Judge Bollinger made no ruling that the circumstances in this case would not be sufficient, as a matter of constitutional law, to justify a sense of apprehension on the part of Trooper Hughes and appropriate preventive action by him. We are, therefore, intimating nothing as to whether, under appropriate circumstances, we would follow the reasoning of a case such as *State v. Smith*.

We are not holding, therefore, that the observations of Trooper Hughes in our case might not, under a set of guidelines similar to those used by *State v. Smith*, have constituted a reasonable justification for a sense of heightened caution or apprehension on the trooper's part and for his order for Wilson to alight from the car as a result thereof. No ruling in that regard was ever made or is before us for review. Judge Bollinger's finding, which was not clearly erroneous, was that Trooper Hughes did not act out of any such sense of apprehension. His suppression ruling, therefore, based on his findings of fact, was not in error.

ORDER TO SUPPRESS EVIDENCE AFFIRMED; COSTS TO BE PAID BY BALTIMORE COUNTY.

APPENDIX B

STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
JERRY L. WILSON	*	FOR BALTIMORE COUNTY
Defendant	*	CASE NO. 94 CR 02601

* * * * * * *

OPINION AND ORDER

This matter came before the Court for hearing on Motion to Suppress filed by the Defendant. Testimony was taken and arguments were heard on November 23, 1994.

The State produced Trooper Hughes of the Maryland State Police, who testified that on June 8, 1994 at approximately 7:30 p.m. he observed a 1994 Nissan Maxima with no apparent tags traveling at what appeared to be a high rate of speed. Trooper Hughes then paced the vehicle for a mile to a mile and a half, and observed the vehicle going 64 m.p.h. in a 55 m.p.h. zone on Interstate 95 (where, in this Court's opinion, no one goes 55 m.p.h.), and then further observed that this vehicle was an Enterprise Rent-A-Car with a paper tag. Three occupants were observed in the vehicle when Trooper Hughes executed a stop of the vehicle. The trooper further testified that the back seat passenger and the front seat passenger turned and looked at the trooper four or five times, their heads went up and down four or five times, and they looked "furtively." It was on this basis that the

trooper requested the driver, Mr. McNichol, to exit the car; Mr. McNichol then produced his driver's license without incident and presented it to Trooper Hughes. Mr. McNichol then informed the trooper that the rental papers were back in the vehicle, and the trooper allowed Mr. McNichol to re-enter the vehicle to obtain the rental papers. The trooper then ordered the right front passenger, Mr. Wilson, the movant in these proceedings, to exit the vehicle, at which time the trooper observed suspected a [sic] controlled dangerous substance after Mr. Wilson's compliance with the trooper's order to exit.

The Assistant State's Attorney in this action argues that Pennsylvania v. Mimms, 98 S.Ct. 330 (1977) is binding upon this Court. In this case the Supreme Court reversed the Supreme Court of Pennsylvania and held that a Philadelphia police officer was properly in his rights to ask Mr. Mimms to step out of his car after being stopped for the purposes of being issued a traffic summons. When Mr. Mimms alighted the officer noticed a large bulge under Mr. Mimms' jacket and, fearing that it might be a weapon, he frisked Mr. Mimms and found a loaded revolver. Mr. Mimms and the other occupant of the car, who was also carrying a revolver, were arrested. The Supreme Court believed that this search was justified on the basis of officer safety, and that it was a de minimis intrusion to ask the driver to step out of the car.

This Court does not find the facts of Pennsylvania v. Mimms to be the factual scenario in this case. In this case the Defendant Wilson was not the driver of the automobile, but a passenger; and, as the Supreme Court said in Pennsylvania v. Mimms at Footnotes 5 and 6, the Court is not holding that an officer may frisk the occupant of any car stopped for a traffic violation but only holds that it is permissible to order the driver out of the car. The Court did not hold whenever an officer has a [sic] occasion to speak with the driver of a vehicle the officer

may order all occupants out of the car, but only the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

In addition, the State argues that Derricott v. State, 327 Md. 582 (1992) was reversed on other grounds. In this case Judge McAuliffe, writing for the Court of Appeals, reversed the judgment of the Court of Special Appeals with respect to stopping the automobile and searching the occupants. Mr. Stocksdale, the Assistant State's Attorney, and this Court must not be reading the same case, as the State seriously contends that this case was reversed on other grounds. Clearly, the Court of Appeals held that a police officer needed reasonable suspicion supported by articulable facts that criminal activity may be afoot. The Court of Appeals stated that the inchoate and unparticularized suspicion or hunch of the officer was not to be the basis for believing that his safety was in danger. There must be specific reasonable inferences which the officer is entitled to draw from the facts in light of experience. In this case the officer's experience is 13 months as a trooper and this Court finds that when the officer allowed the driver of the vehicle to return to the car to obtain the rental documents he could not have had a reasonable suspicion that the person was armed and dangerous; and, therefore, any future intrusion into the right of the occupants of the car are [sic] violative of one's Fourth Amendment proscription of unreasonable searches and seizures.

In view of the above, on this 10th day of January, 1995 the Motion to Suppress items seized from Mr. Wilson is hereby GRANTED.

/s/
THOMAS J. BOLLINGER, JUDGE

TJB/am

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APPENDIX C

STATE OF MARYLAND	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 366
JERRY WILSON	*	September Term, 1995 (No. 113, September Term 1995, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari and the supplement to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

ROBERT C. MURPHY
Chief Judge

Date: November 22, 1995

APPENDIX D

IN THE COURT OF
SPECIAL APPEALS OF MARYLAND

STATE OF MARYLAND,	*	
Appellant	*	
v.	*	No. 113
JERRY LEE WILSON,	*	September Term, 1995
Appellee	*	

* * * * * * *

ORDER

For reasons to be recited in an Opinion to be filed hereafter, it is, by the Court of Special Appeals this 17th day of July, 1995,

ORDERED, That the order of the Circuit Court for Baltimore County granting appellee's motion to suppress is AFFIRMED. Costs to be paid by Appellant. Mandate to issue forthwith.

FOR A PANEL OF THE COURT
(Judges Wilner, Moylan and Harrell) :

/s/
CHIEF JUDGE